

HEMPHILL INDEPENDENT SCHOOL DISTRICT

P.O. BOX 1950 - HEMPHILL, TX 75948

Phone (409) 787-3371 - Fax (409) 787-4005

RECEIVED & INSPECTED

OCT 14 2004

FCC - MAILROOM

MIKE TERRY, Superintendent

SALLY BUTLER
Business Manager
ELIZABETH MCBRIDE
Shared Service Arrangement Director

STEVE MILLS
High School Principal
C. J. O'NEAL
Middle School Principal
JIMMY CLARK
Elementary Principal

MARC GRIFFIN
Counselor
KAY UPSHAW
Counselor

October 6, 2004

Letter of Appeal - Year Seven
471 Applications # 411655
Billed Entity # 140807
FRN 1129028
Applicant Form ID ESC7NETYR7
CC Docket No. 02-6

DOCKET FILE COPY ORIGINAL

Reference Administrators Decision on Appeal Funding Year 2004-2005 dated September 24, 2004

Reason: The crux of the denial is that what was submitted to the PIA under review does not constitute a contract: per the SLD, a contract must at least contain the term (service start and end dates, expiration date) of the agreement between the service provider and the applicant of the services that will be provided. Therefore, since the SLD does not consider our contract as a multi-year contract, a form 470 should have been filed; the SLD now considers the requested service as month to month, or tariff services thus requiring a new form 470... Denied in full.

Response:

While I respect the immensity of the SLD oversight, and I appreciate the prompt response to my appeal, I do not concur with the factors they used to review the appeal. Specifically, I have yet to see a template for what constitutes a multi-year contract on the SLD web site; and while I agree that certain terms must be addressed in a multi-year contract, the specifics of such are rather vague and ambiguous. I am attaching a copy of our multi-year contract with ESC7NET. Please note that there is in Item #20 of the contract, an execution date which constitutes a beginning date, and was executed prior to the form 470 filing requirements of year seven and in fact was the basis for the year six form 470. As for the end date as specified in the administrator's denial letter: while there is no pre-determined end date specified in the contract, it is an open ended contract that, as specified in item #8, either party may terminate this agreement at the end of the semester, school term or summer session by providing the other party with written notice, signed by the superintendent, or by the executive director of Region VII ESC at least thirty days (30) prior to the end of the semester, term, or summer session. It is my contention that item #8 constitutes a termination clause to the contract: essentially a termination method, and that neither party has exercised the option, then the contract is still in effect and constitutes a multi-year contract.

Please review your decision and let me know as soon as you can.

Contact: Douglas L. Botts
Address: 1000 Milam St. P.O. Box 1950, Hemphill, TX 75948
Telephone: 409.787.3371 Fax: 409.787.4197 E-mail: doughb@hemphill.esc7.net

Sincerely,


Douglas L. Botts
Technology Director

No. of Copies rec'd
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Region VII Education Service Center
ESC7NET
1909 N. Longview Street
Kilgore, Texas 75662
903-988-6700

Date: January 17, 2003

To: Mr. Mike Terry - Hemphill ISD

Thank you again for your participation in ESC7NET. This is your copy of the service agreement with ESC7NET. If you have any questions concerning services or this document, please contact Mr. Leon Murdoch at 903.988.6700.

Sincerely,

Vicky Harton

Vicky Harton
Region VII ESC

**INTERLOCAL GOVERNMENTAL AGREEMENT FOR THE PROVISION OF
CONNECTIVITY TO THE EDUCATION SERVICE CENTER, ESC7NET
PRIVATE REGIONAL WIDE AREA NETWORK
BETWEEN ESC7NET
AND
HEMPHILL INDEPENDENT SCHOOL DISTRICT**

STATE OF TEXAS §

COUNTY OF GREGG §

ESC7NET, in contract with Education Service Center, Region VII, ("ESC7NET") and the Hemphill Independent School District ("District") enter into the following agreement regarding the provision of connectivity to the Education Service Center, ESC7NET Private Regional Wide Area Network ("ESC7 Net"):

Witnessed

WHEREAS, District, Hemphill Independent School District located in Sabine County,

WHEREAS, ESC7NET is the bundled Internet Service Provider;

WHEREAS ESC7NET is a private wide area network designed to assist school districts in improving student performance and increasing the efficiency and effectiveness of school operations;

WHEREAS, ESC7NET is given authority to sell its services to District pursuant to TEC § 8.052;

WHEREAS, District is given authority to purchase any service from ESC7NET pursuant to TEC § 8.002;

WHEREAS, ESC7NET and District are authorized to enter into this Agreement pursuant to the Interlocal Cooperation Act, Texas Gov't. Code § 791.001 et. Seq., which authorizes local governments to contract with each other to perform governmental functions and services under the terms of the Act.

NOW, THEREFORE, ESC7NET and District agree as follows:

1. ESC7NET will provide District with access to a wide area network that allows transmission of video, voice, and Internet services.
2. District will accept services provided by ESC7NET pursuant to all the terms of this agreement.
3. District will pay a monthly fee to ESC7NET for the provision of ESC7Net services as set forth in Exhibit "A."
4. Said payment is to be made on or before the 15th of each month, at ESC7NET Region VII Education Service Center, whose address is:
1909 North Longview Street
Kilgore, Texas 75662
5. If payment is not tendered at the time and under the conditions noted above, the amount due shall bear interest after the due date at the rate of ten percent (10%) per annum.
6. If payment is not tendered at the time and under the conditions noted above, District would pay on demand all costs of collection, legal expenses, and attorney's fees incurred or paid by ESC7NET in collecting or enforcing this contract.
7. District agrees not to resell, transfer, assign, provide or otherwise distribute ESC7Net connectivity, or services without written authorization from ESC7NET.
8. Either party may terminate this agreement at the end of a semester, school term, or summer session by providing the other party with written notice, signed by the Superintendent, or by the Executive Director of Region VII ESC, at least thirty (30) days prior to the end of the semester, term, or summer session. Should notice not be received in sufficient time to discontinue service(s), on or before the requested date the additional fees incurred by ESC7Net will be charged.
9. This undertaking may expose the parties to some risk of financial or other loss resulting from harms that could happen to (i) third parties such as students who access the Internet through the equipment provided by ESC7NET; (ii) either party to this agreement due to security breaches; or (iii) either party to this agreement arising from disruption of services due to network outages caused by events such as scheduled or unscheduled maintenance, accidents which sever network connectivity, or deliberate sabotage of the network connection by entities inside or outside ESC7NET.

ESC7NET could not agree to provide this access to District if ESC7NET had to be responsible for all the possible financial or other losses of those who might be harmed by District's access to these capabilities. District agrees, therefore, to be responsible for, and to the extent authorized by the Constitution and laws of the State of Texas, and the Constitution and laws of the U.S. Government, to indemnify ESC7NET against, any harms that may happen to third parties or to District resulting from ESC7NET's faithful (non-tortious) performance of its agreements hereunder.

10. The Parties agree that ESC7NET shall under no circumstances be held responsible or liable for situations where the security, stability, or availability of ESC7NET Services is compromised by the District directly, by software or programs provided to ESC7NET by the District, or by actions ESC7NET undertakes at the request of the District.
11. The parties agree that ESC7NET shall under no circumstances be held responsible or liable for situations where data or transmissions are accessed by third parties through illegal or illicit means, including situations where the data or transmissions are accessed through the exploitation of security gaps, weaknesses or flaws (whether known or unknown to ESC7NET at the time) which may exist in any software or hardware including software or programs provided to ESC7NET by the District and any other software or hardware utilized by the District in connection with ESC7NET beyond the exclusive control of ESC7NET.
12. ESC7NET may provide the District with Equipment or Software to be used by the District in accessing ESC7 Net. The District shall properly use the Equipment or Software provided by ESC7NET, and the District will provide facilities and security for proper operation and maintenance of, and will not alter, move, connect, or disconnect this Equipment or Software without first calling and obtaining oral approval from ESC7NET. The District shall be solely liable for any loss or damage to the Equipment or Software caused by the negligence or willful acts of the District or its officers, employees, agents, or contractors, or for loss or damage of the Equipment or Software through theft or vandalism on the District's premises. Moreover, in the event of any alteration, movement, connection or disconnection of or any other tampering or adjustments to the Equipment or Software by the District without the prior express approval of ESC7NET, ESC7NET shall be completely released from any liability or obligation (including any warranty or indemnity obligation) to the District arising from or relating to the Equipment or Software that was affected by such action of the District, and the District shall be liable to ESC7NET for costs or damages incurred by ESC7NET.
13. ESC7NET shall not be responsible for the installation, operation, or maintenance of equipment or software not provided by ESC7NET; nor shall ESC7NET be responsible for the transmission or reception of information by equipment or software not provided by ESC7NET.

14. The District shall be responsible for the use and compatibility of equipment or software not provided by ESC7NET. In the event that the District uses equipment, software, or supplies not provided by ESC7NET which impairs its use of ESC7NET, the District shall nonetheless be liable for payment to ESC7NET for maintenance needed as a result of equipment failure or performance problems caused by the District's use of equipment, software, or supplies not provided by ESC7NET. Upon notice from ESC7NET that the equipment or software not provided by ESC7NET is causing or is likely to cause hazard or interference, the District shall eliminate the likelihood of hazard or interference. The District shall if necessary be liable for all costs incurred by ESC7NET to troubleshoot difficulties caused by equipment or software not provided by ESC7NET.
15. The District agrees that its use of ESC7Net will be in a manner consistent with this Agreement, the Operating Rules, the Policies, and with all applicable laws and regulations, including with limitation, copyright, trademark, and export control laws prohibiting the use of telecommunications facilities to transmit illegal, obscene, threatening, harassing, or other offensive messages. The District acknowledges that ESC7NET is not responsible for any use or misuse of ESC7Net by the District or its Authorized Users. In particular, the District shall not, nor shall it permit or assist others, to abuse or fraudulently use ESC7Net, including but not limited to the following:
- (a) To obtain or attempt to obtain Network Services by any fraudulent means or device with intent to avoid payments;
 - (b) To access, alter, or destroy any information of another ESC7NET Member by any fraudulent means or device, or attempt to do so; or
 - (c) To use ESC7NET so as to interfere with the use of ESC7NET by other Districts or authorized users.
16. ESC7NET warrants it will use reasonable care in providing Network Services under this Agreement. Except for maintenance and periods of shut-down caused by equipment, system or power failure, or other causes beyond the reasonable control of ESC7NET, specifically including periods of shut-down caused by software or programs provided to ESC7NET by the District, the system will be operational twenty-four (24) hours a day, seven (7) days a week.
17. **ESC7NET MAKES NO EXPRESS OR IMPLIED WARRANTY OR CONDITION WITH RESPECT TO THE PROGRAMS OR GOODS OR SERVICES TO BE SUPPLIED TO THE DISTRICT, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. ESC7 NET SERVICES ARE PERFORMED AND DISTRIBUTED ON AN 'AS IS BASIS' WITHOUT WARRANTIES OF ANY KIND EITHER EXPRESS OR IMPLIED. NEITHER ESC7NET NOR ANY OF ITS SUBSIDIARIES MAKES ANY WARRANTY OR CONDITION RESPECTING THE RESULTS OF ANY PROGRAM OR SERVICES OR THAT ALL ERRORS IN THE PROGRAM OR SERVICES WILL BE CORRECTED, OR THAT THE FUNCTIONALITY CONTAINED IN THE PROGRAM WILL MEET THE DISTRICT'S REQUIREMENTS.**

19. IN THE EVENT THAT DATA FURNISHED BY THE DISTRICT OR ANY CLIENT, WHETHER TRANSMITTED VIA ESC7NET OR OTHERWISE, IS LOST OR DESTROYED OR DAMAGED DUE TO THE NEGLIGENCE OF ESC7NET, ESC7NET'S AGENTS OR EMPLOYEES, THE DISTRICT'S SOLE REMEDY SHALL BE THE REPAIR OR REPLACEMENT BY ESC7NET OF SUCH LOST, DESTROYED OR DAMAGED DATA, PROVIDED HOWEVER THAT SUCH REPAIR OR RESTORATION CAN REASONABLY BE PERFORMED BY ESC7NET AND PROVIDED, FURTHER, THAT THE DISTRICT FURNISHES ESC7NET WITH ALL SOURCE DATA, IN MACHINE READABLE FORM, NECESSARY FOR SUCH REPAIR OR RESTORATION. THE PARTIES ACKNOWLEDGE THAT THE DISTRICT MAY PROVIDE TO ESC7NET SOFTWARE OR PROGRAMS TO BE USED BY ESC7NET IN ITS PERFORMANCE UNDER THIS AGREEMENT. ESC7NET MAKES NO WARRANTY WHATSOEVER REGARDING SUCH SOFTWARE OR PROGRAMS, AND UNDER NO CIRCUMSTANCES WILL ESC7NET BE LIABLE FOR, OR WILL ANY INDEMNIFICATION RIGHTS AGAINST ESC7NET ARISE OUT OF OR IN CONNECTION WITH, THE SOFTWARE OR PROGRAMS PROVIDED TO ESC7NET BY THE DISTRICT.

19. THE PARTIES' SOLE OBLIGATIONS AND LIABILITIES ARE AS STATED IN THIS AGREEMENT AND ALL OTHER REPRESENTATIONS, CONDITIONS, WARRANTIES AND TERMS EXPRESS OR IMPLIED WHETHER BY STATUTE, LAW OR OTHERWISE ARE HEREBY EXCLUDED TO THE FULL EXTENT OF THE LAW.

20. THIS AGREEMENT, INCLUDING ALL MATTERS RELATING TO ITS VALIDITY, CONSTRUCTION, PERFORMANCE, AND ENFORCEMENT, SHALL BE GOVERNED BY LAWS OF THE STATE OF TEXAS. The obligations and undertakings of each of the parties to this agreement shall be performed at Kilgore, Gregg County, Texas. Executed at Kilgore, Gregg County, Texas, on June 16, and 6 yr.

EXECUTED on the 16 day of June, 03 Yr.

ESC7NET

Elizabeth Abernethy

1-16-03

Mrs. Elizabeth Abernethy
Executive Director
Education Service Center Region VII

Date

Hemphill Independent School District

Mike [Signature]
Superintendent

12-19-02
Date